IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 140 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA : Sd/-

HONOURABLE MR.JUSTICE K.S. JHAVERI : Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASHOKBHAI TALSHIBHAI RAMANI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR SV RAJU for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1-2,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE K.S. JHAVERI

Date : 11/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellants-accused being aggrieved and dissatisfied by the judgment and order of conviction and sentence dated 31.12.1998 passed by the learned Additional Sessions Judge, Rajkot whereby the appellant-accused no.1 was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.500/-, in default, to undergo one month S.I. for the charge under Section 302 of the Indian Penal Code and the appellant-accused no.2 was sentenced to undergo six months rigorous imprisonment and fine of Rs.500/-, in default, to undergo 15 days R.I. The original accused nos.3 to 8 were however acquitted of the charges leveled against them. However, State has not preferred any appeal against the said Judgment and Order of acquittal.

2. The case of the prosecution in short is that on 27.12.1996 at about 9 o'clock, when the complainant viz., Gajendra Dilipsinh Jadeja was at his residence, his friend viz., Ravat Rambhai Ahir (deceased for short) along with Kaushik came to his residence and told him that

they all are going to watch movie in Nilkanth Cinema. Accordingly, they went to Nilkanth Cinema and purchased tickets for 4th show. Since there was little time left, they crossed the road and went to Jalaram Pan House for chewing pan, which was in opposite direction. After chewing pan, while returning towards Nilkanth Cinema, one scooterist came and dashed the complainant and Bhupatbhai. As a result of that, both these persons and scooterist fell down and, thereafter, altercation took place between them. At that time, some young boys of Bharvad community came and tried to intervene and altercation resisted there itself. Thereafter, they along with his nephew viz., Dilo had gone to see movie. While proceeding from Nilkanth Cinema, the deceased sent his nephew, Dilo for bringing bandage as he received nail injuries in the first incident. Hence, Dilo went outside the theater for taking bandage. While returning with the bandage, a person, who was standing in the lobby of Nilkanth Cinema and having long hair and beard i.e. the appellant-accused no.1 gave kick blow to Dilo, but Dilo could not do anything and, hence, he went into theater and narrated the same to his uncle (deceased). As a result of that, the deceased came out from the theater and, thereafter, altercation took place between the deceased and the accused no.1 and the

deceased slapped him. As a result of that, the accused no.1 left the premises giving threat that “wait here, I will be back”. On the very same day at about 11:45 hours, when the complainant and the deceased were proceeding towards Jalaram Pan House for chewing pan, the accused no.1 armed with gupti and accused nos.2 to 8 armed with sword, gupti, hockey, knife etc. with a common intention to kill the deceased after making an unlawful assembly came there and the accused no.1 gave knife blow on the left waist of the deceased and accused nos.2 to 8 also beat the complainant and other witnesses. As a result of that, the deceased fell down on the spot. Thereafter, the accused persons ran away from the place of offence. The deceased was taken to Madhuram Hospital by Kaushikbhai and Dilo @ Dilipbhai in an autorickshaw. In the meantime, the doctor informed the Police regarding the incident by way of telephonic message. On examination of the deceased, the doctor declared him dead and, therefore, again, he telephonically informed the Police to that effect. In pursuance of that, P.I. of Bhaktinagar Police Station came to Hospital and recorded the complaint given by Gajendrasinh and same has been sent to Bhaktinagar Police Station for the purpose of registration. In pursuance of that, same has been registered as Bhaktinagar Police

Station I-C.R.No.529/1996 for the offence punishable under Sections 143, 147, 148, 149, 324 and 302 of the Indian Penal Code and investigation was handed over along with report to Police Inspector, Shri Pawar. In pursuance of that, he recorded the statements of various witnesses, went to the scene of offence, drew the panchnama in the presence of panchas, searched the accused persons, arrested present appellant-accused on 30.12.1996 and asked for police remand. The accused no.1 has shown willingness to produce the muddamal gupti used by him in the alleged offence and, therefore, preliminary panchnama was prepared and seized the muddamal gupti. The clothes worn by the accused at the time of incident at his instance was also seized by way of Panchnama under Sec.27 of the Indian Evidence Act. He also collected P.M. report, injury certificate of the victim and other witnesses. He also made arrangements for sending the dead body of deceased for postmortem. On receiving the postmortem and FSL reports, same were kept in investigation file. Upon completion of investigation, charge sheet was submitted against the accused in the Court of Learned Chief Judicial Magistrate, Rajkot.

3. As the offence alleged against the accused was exclusively triable by the Court of Sessions, the Learned Chief Judicial Magistrate, Rajkot

committed the case to the Court of Sessions at Rajkot where it was numbered as Sessions Case No.84 of 1997 and transferred to the Court of Learned Additional Sessions Judge, Rajkot for trial. The learned Judge framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

4. To prove the case against the accused, the prosecution examined 25 prosecution witnesses and also relied on various documentary evidence.

5. On submission of closing purshis by the prosecution, Learned Additional Sessions Judge recorded the further statement of the accused under Section 313 of the Code of Criminal Procedure. Thereafter, on hearing the learned counsel appearing for the respective parties, the Learned Additional Sessions Judge, Rajkot, delivered the impugned judgment, which gave rise to prefer this Criminal Appeal.

6. Heard learned Counsel, Mr.S.V. Raju and learned APP, Mr.H.L. Jani for the State. We have been taken through various oral as well as documentary evidence and the reasoned judgment delivered by the Court below.

7. After taking us through the evidence of P.W.No.1 viz., Jorubha Jilubha, Exh.21 (Page No.99 of the paper book), it has been argued by the learned counsel for the appellants, Mr.S.V. Raju that he is the door keeper of Nilkanth

Cinema and at the time of second altercation, he was there. From the evidence of this witness, what is established beyond reasonable doubt is that the quarrel has taken place between the deceased and person, who was having long hair and beard. He admitted that he has not seen rest of the incident.

8. After taking us through the evidence of P.W.No.2 viz., Bharat Harilal, Exh.22 (Page No.101 of the paper book), it is argued that he is also a door keeper of the Nilkanth Cinema, but from his evidence what is established is that he has heard the second incident later on. He has categorically deposed that at the time of incident, the deceased and his friends were in the theater watching movie. He also deposed that he knows them since last many years.

9. After taking us through the evidence of P.W.No.3 viz., Rajeshbhai Harilal, Exh.23 (Page No.103 of the paper book), it is argued that he is also operator of Nilkanth Cinema. His evidence is not supporting either in favour of the prosecution or the accused because whatever deposed by him has been on the basis of hearsay.

10. After taking us through the evidence of P.W.No.4 viz., Hashmukh Nirmaldas, Exh.24 (Page No.105 of the paper book), it is argued that as per the prosecution case, he was the scooterist and driving the scooter at the time of third

incident and the accused no.1 viz., Ashok was sitting as pillion rider and he got down near Nilkanth cinema at the time of third incident.

11. After taking us through the evidence of P.W.No.5 viz., Lakhmanbhai Nanjibhai, Exh.24 (Page No.107 of the paper book) and P.W.No.6 viz., Rahimbhai Ibrahimbhai, Exh.25 (Page No.110 of the paper book), it is argued that P.W.No.5 is the maternal uncle of the accused no.1. It is further argued that the P.W.No.6 was there in Nilkanth Cinema watching the film. As per the prosecution case, both these witnesses are the witnesses of incident, however, they are not supporting the prosecution case and have been declared hostile.

12. After taking us through the evidence of P.W.No.7 viz., Yogesh Kantibhai, Exh.27 (Page No.112 of the paper book), it is argued that this witness also went to see the movie in Nilkanth Cinema. He has also not supported the case of the prosecution and was declared hostile.

13. After taking us through the evidence of P.W.No.8 viz., Gajendrasinh Dilipsinh, Exh.35 (Page No.123 of the paper book), it is argued that in all the three incidents, this witness was present with the deceased from beginning to end. He also received injuries on leg and shoulder by knife blow and he is the person who

took the deceased along with other to Madhuram Hospital, wherein he was also treated as an indoor patient and gave the FIR to P.S.I., Shri Pavar. Through him, the prosecution has able to prove the FIR Exh.93. As the above referred witness is the important injured eyewitness, his evidence is required to be dealt with by this Court for the purpose of deciding this appeal along with other witnesses.

14. It is required to be noted that the above witnesses i.e. the P.W.Nos.1 to 4 have not supported the case of the prosecution and have been declared hostile and no material evidence has come out either in favour of the prosecution or against the prosecution.

15. On evaluation of the evidence of above referred witnesses, it has been established that on the day of incident at about 9:30 p.m., when the complainant was at his residence, deceased and one Kaushik, who are friends of the complainant came to his house and informed that they all would see a movie in Nilkanth Cinema and, therefore, they had gone there and purchased tickets of last show. As there was time to start the movie, they crossed the road and went to opposite direction for chewing at Jalaram Pan Cabin, where one of the friends of the complainant viz., Bhupat met them. After taking pan, when they were crossing the road, one scooterist came from Sarothiya Chowk and dashed

his scooter to complainant and Bhupat. As a result of that, all three including scooterist fell down and, therefore, some altercation took place. At that time, some young boys of Bharwad community tried to intervene and, hence, the dispute was settled there itself. Thereafter, they all went to Nilkanth Cinema. During the exhibition of the film, when nephew of the deceased, Dilo was coming with bandage, one person, who was standing in the lobby of Nilkanth Cinema, gave kick blow to Dilo and, hence, he went to the deceased and informed regarding the same and, thereafter, he came out from the theater, met a person, who was having long hair and beard and altercation took place between them. Meanwhile, Kaushik came back and informed the complainant that in the lobby of the Nilkanth Cinema, altercation was going on between the deceased and one Ashok i.e. accused no.1 and, therefore, the complainant came out from theater and saw the deceased and his nephew on one side and on the other side, the accused no.1 was there. Therefore, on inquiry being made through the deceased, he was informed that as the accused no.1 was abusing him, he slapped him and while leaving the place, he threatened that “wait here, I will be back” Thereafter again, they had gone to Pan House. After taking pan, when they were stepping down from Nilkanth Cinema, the accused

no.1, who was pillion rider along with one unknown person came on scooter and tried to give gupti blow to deceased and, hence, the complainant tried to intervene and saved his life. Thereafter, the deceased tried to cross the road, but the accused no.1 chased him. The complainant also chased the accused no.1 and when the deceased reached very near to Jalaram Pan House, the accused assaulted the deceased with gupti and gave gupti blow on the left portion of waste. As a result of that, the deceased again tried to run away from the scene of offence, but he could not run further and he fell down. During that scuffle, somebody else gave knife blow on left shoulder of the complainant. The surrounding persons gathered there and, hence, accused ran away along with gupti towards Sorathiya chawk. Thereafter, the deceased and the injured were taken to hospital by their friends and others to Madhuram Hospital in an autorickshaw.

16. It is also established from the evidence on record that the complainant narrated incident in detailed to Dr.Hemang and as it was a medico-legal case, said doctor informed concerned Police Station about the incident. Upon examination, the deceased was declared dead by the doctor. Thereafter, Police came to hospital and the complainant gave FIR, Exh.93. In short, above referred witness has given

account of all the three incident in detail and he stuck to his version as narrated by him in FIR, Exh.93. His evidence is consistent with the FIR given at the earliest opportunity i.e. within half an hour of the incident. Not only that, even the names of the assailants i.e. the accused nos.1, 2 and 3 have been disclosed along with their respective role in the FIR. Even names of the assailants have been disclosed in the telephonic vardhi. Not only that the case history noted down by Dr.Hemang upon the case paper which is first in time is also consistent with the FIR and the evidence given by the complainant before the Court. So the evidence of P.W.No.8, complainant, Gajendra Exh.35 is the evidence of injured witness and his injury has been proved by way of his oral evidence of P.W.No.18, Exh.60 (Page No.205). Dr.Hemang has deposed in his deposition that he examined both the injured i.e. the deceased as well as the complainant. He also proved the injury certificate, Exh.61 issued by him.

17. We have also minutely gone through the cross-examination of above referred witnesses. It has been established from the evidence on record that the evidence of Gejendra is consistent, his presence is natural one and as he himself is an injured witness, his presence in the hospital along with the deceased is also natural one and, hence, his presence cannot be

discarded being trustworthy and reliable and his presence has been established beyond reasonable doubt. It has been established from his evidence and from the evidence of other witnesses that they were good friends and even his presence at Nilkanth Cinema has been established by way of oral evidence of P.W.No.2, Exh.22, Bharat. He himself has categorically deposed that on the day of incident, more particularly, before the incident, the complainant, deceased and their friends were into Nilkanth Cinema and were watching a movie. It has been categorically deposed by him that he know all the above referred persons since long. So the presence of Gajendra has been established even by way of this witness along with P.W.No.17, Mahesh, Exh.58, P.W.No.16, Satubha Exh.57 along with P.W.No.9, Kaushik, P.W.No.14 viz., Dilo, Exh.53. From the above referred evidence of witnesses, the presence of the victim, injured complainant and others has been established in all the three incidents as discussed above. We, therefore, believe that the prosecution has established the presence of Gajendra at the time of all the three incidents beyond reasonable doubt. He himself is the injured witness and we have evaluated his evidence in toto and we are fully satisfied and we are of the opinion that his evidence is trustworthy

and free from all doubts and nothing contrary has come out which turtle his evidence. We are also of the opinion that for the purpose of proving the evidence, number of witnesses are not required. If single eye witness is there and his evidence is trustworthy and presence is natural one then, the Court can certainly rely upon his evidence and convict the accused only on that solitary witness. Here in this case along with Gajendra there are other eye witnesses, from whom also, the prosecution has got corroboration. It is also required to be made it clear at this stage that it has been established from the evidence on record that Gajendra, accused nos.1, 2 and 3 and P.W.No.9 Kaushik Vyas all are staying in the same vicinity, known as Kevadavadi area, wherein the accused nos.1 to 3, Gajendra and Kaushik were staying since long and were knowing to each other from very beginning. It is required to be made it clear that all three incidents took place in a row, wherein altercation took place and the deceased was killed by chasing and since the accused, deceased and other witnesses are from the same vicinity and knowing each other since long, question of misidentification may not be arisen at all.

18. We have also gone through the evidence of P.W.No.9, Kaushik, Exh.34 (Page No.134) which has been shown to us by the learned counsel for

the accused, wherein he has categorically deposed that he, Gajendra and all accused were staying in the same vicinity known as Kevadavadi and, hence, they are knowing each other since long. This witness in his deposition before the Court below has categorically stated that he was also coming from Nilkanth Cinema along with Gajendra, deceased and other, however, at that time, the deceased and the injured were little ahead and when he was on last step of Nilkanth Cinema, he saw the incident in question. According to him, he has seen the incident and all the three accused while running towards Sorathiyavadi. He has clearly admitted that he has not seen the accused no.1 giving blow to the deceased. So his evidence is helpful for all three three incidents. However, from the evidence of above referred witness, the prosecution is able to prove the presence of Gajendra, deceased, Dilo and others at the time of incident.

19. Simultaneously, we have also gone through the evidence of P.W.No.14, Dinesh @ Dilo, Exh.53 (Page No.182). This witness is one of the witness of incident and the persons, who took the deceased and injured, Gajendra along with others into Madhuram Hospital. We have minutely gone through cross-examination of the witness. This witness has fully supported the say of the prosecution and the evidence of complainant

viz., Gajendra and, therefore, we are not repeating the same at this stage. What is established from the evidence is that he was there also with the deceased, complainant and other witness, Kaushik Vyas and he is the prime witness of second incident, which took place in Nilkanth Cinema's lobby and which gets support from the evidence of other witnesses to the effect that when he was entering into the theater through the lobby of Nilkanth Cinema, the accused no.1, Ashok was standing there and started giving kick and fist blow to him. This witness narrated this incident to his uncle i.e. the deceased and, hence, he came out from the theater and, thereafter, altercation took place between the deceased and the accused. During that time, the deceased gave one slap to accused and in turn, the accused no.1 left the place giving threat that he will be back. This witness is also the witness of third incident which took place after an hour and same has been categorically discussed in his evidence which is fully supported the say of the prosecution.

20. As stated above, this witness is the witness of incident, who remained with the deceased and the complainant and other witnesses from beginning tii the end and took the deceased and injured to Madhuram Hospital. He identified the accused at the time of incident as also in the

Court and nothing contrary has come in his evidence, which turtle his evidence.

21. Over and above, there are two other witnesses, from which also, the prosecution got corroboration i.e. P.W.No.16 & 17. According to prosecution, both are the eye witnesses of third incident and were sitting near to tea stall of Hanubha along with one Mahesh Lambo. They deposed that at the time of incident, three persons were coming towards them and started quarreling with each other. They also deposed that there was a person having long hair and beard and other two were Ravat and Gajendrasinh. They deposed that during that altercation, the person who was having long hair and beard gave gupti blow on the waist of the deceased. As a result of that, deceased fell down. They also identified the person into the Court room as accused no.1 while he was sitting into the Court along with other accused. It is established from the evidence on record that at the time of recording his evidence, the accused no.1 was not having long hair and beard then also, they have identified him. In short, both these witnesses are the witnesses of incident and support the say of the prosecution in toto.

22. In short, the prosecution is able to establish the case against accused no.1 beyond reasonable doubt by way of oral evidence of P.W.Nos.8, 9,

14, 16 and 17 and all have identified the accused no.1 as assailants along with the muddamal gupti used by him. As discussed above, as three incidents have taken place in the same area within a period of 2-3 hours and as all were known to each other prior to that incident, question of misidentification may not be arisen at all. So, according to us, the prosecution is able to prove that prior to main incident, two other incidents have taken place between the victim and accused no.1 It is also proved by the prosecution that the accused no.1 has given threat to come back and he came back and gave blow to the deceased, but as the complainant tried to intervene, the deceased was able to escape from the scene of offence, but accused no.1 chased him, caught hold of him and gave gupti blow and, thereafter, ran away from the place of offence. Not only that, the prosecution is also able to prove other aspect of the matter that after the arrest and while in police custody, the accused no.1 has shown willingness on 31.12.1996 to find out and produce the muddamal gupti used by him in the crime in question along with the clothes worn by him at the time of incident and, thereafter, at the instance of accused, muddamal gupti and clothes of the accused have been found out and same were discovered by preparing panchnama, Exh.43 (Pg.160) and same has been proved beyond

reasonable doubt. Not only that, both muddamal i.e. clothes of the accused and gupti were having blood stains. Clothes have been washed and pressed with iron box then also, they were having blood stains. Both muddamal articles have been sent into FSL and on examination, FSL opined that muddamal article nos.7, 9 and 10 were having blood stain of human blood, but as the blood was insufficient for the purpose of determining the group, they could not find out the blood group. But the facts remain that, the prosecution has been able to establish that the above referred gupti as well as clothes except muddamal article nos.9 and 10 have been hidden in such a place, which has not been known to all concerned.

23. Not only that, the prosecution has able to prove the injury received by the complainant as well as Gajendra by way of injury certificate, Exh.61 through Dr.Hemang Harishchandra, Exh.60 (Pg.No.205). It is established from the said certificate that the injuries received by both the witnesses could be possible by way of sharp cutting instrument. Not only that, the prosecution has also proved the history noted down by the doctor upon the case papers recorded at the earliest and same has been categorically deposed by Dr.Hemang Harishchandra. It has also been established from his evidence that as it was a medico-legal

case, he informed the same to the concerned Police Station by way of telephonic vardhi and also proved certificate, Exh.62 given by doctor for postmortem and along with certificate, Exh.63, wherein he has categorically narrated that when the deceased was brought into the hospital, he was dead. It appears from the Exh.48 that Gajendra and Kaushik along with others had brought the deceased into the hospital. He has also deposed in para of his deposition that when Gejendra was brought in an injured condition, he was fully conscious and at that time of giving FIR also, Gajendra was fully conscious. So, prosecution has got support from the above referred evidence.

24. Telephonic vardhi was proved by way of oral evidence of P.S.O.-P.W.No.13 viz., Abidali Sidikbhai, Exh.44 (Pg.No.166). As per his deposition, he is the person, who made Station Diary Entry No.3 into station diary and on receiving the complaint along with the report from the P.S.I, Shri Pawar, he registered the offence as Bhaktinagar Police Station I-C.R.No.520/1996 under Sections 143, 146, 147, 148, 149, 302 and 324 of the Indian Penal Code and, thereafter he handed over the investigation to P.S.I., Shri Pavar, through him, the prosecution has also been able to prove station diary entry no.3 (Exh.45 to 49). He also deposed that at initial stage, on the

basis of telephonic vardhi, he has given yadi to P.S.I, Shri Gondaliya, but in the meanwhile, on receiving the second telephonic Janava Jog Entry No.4/1996, he has informed Police Inspector, Shri Pawar that it was a fatal incident and, therefore, Shri Gondaliya prepared yadi and kept with file with the endorsement of Shri Pawar. Thus, the prosecution by way of evidence of Police Inspector, Shri Pawar, P.W.No.25, Exh.92, (Pg.No.280) has proved FIR (Exh.93). He has also given account of whole investigation and also categorically deposed that he went to hospital of Dr.Hemang along with his police personnel and recorded the complaint as given by Gajendra. It is also established that the prosecution got support from other evidence regarding discovery panchnama and panchnama of scene of offence, Exh.41 and same has been proved by the prosecution by way of evidence of Police Inspector, Shri Pawar along with evidence of P.W.No.11, Tulsidas Amarsinh, Exh.40 (Pg.No.145). In short, the prosecution is able to prove the guilt of the appellants-accused beyond reasonable doubt by way of above referred evidence of Dr.Mahammad Usman, P.W.No.19, Exh.64. This witness has categorically opined that the injuries alleged to have been received by the deceased are sufficient to cause death in the ordinary

course of nature, more particularly, injury no.1 and corresponding injury nos.1, 2, and 3. This witness after performing postmortem, issued P.M. Report (Exh.66). After seeing the muddamal gupti, the doctor has categorically opined that the above referred injuries are possible by way of muddamal gupti. Even, FSL Expert has opined and prosecution has proved the same through him. Even cut mark of the clothe of the deceased also support the say of the prosecution because FSL officials have categorically opined that all the cut marks are possible by way of muddamal article gupti and, therefore, doubt created by the other side during the course of trial that previously sword has been mentioned and later on gupti has been replaced, has been ruled out. But the facts remain that all evidence on record support the say of the prosecution to the effect that the fatal injury i.e. the injury no.1 received by the deceased is possible by way of muddamal gupti no.7.

25. It is also proved that gupti has been produced by the accused by way of 27 panchnama, which was having blood stain of human. Not only that, cut mark on the clothes also support the say of the prosecution that it has been possible by way of muddamal gupti, article no.7. Not only that, Dr.Hemang Harischandra, (P.W.No.18, Exh.60) has also categorically deposed that he

has never telephonically informed to Police Station regarding the injury caused to the deceased by sword. This witness is the independent person and has nothing to do either with prosecution or with the accused and, therefore, it is one more aspect which also helps the prosecution. Over and above, it is also proved by way of scientific evidence of FSL Exeprt.

26. The last question which remains to be dealt with by this Court as argued by the learned counsel for the appellants-accused is that it is a case of only one blow and, hence, at the most, it falls under Section 304 Part II of the Indian Penal Code. In this regard, he has placed reliance upon three judgments reported in 2000(10) SCC 225 (Paragraph No.2), 2002(9) SCC 539 (Head Note – C) and 2005(12) SCC 176.

27. We have gone through the above referred reported judgments relied upon by the learned counsel for the appellant. Keeping in mind the ratio laid down by the Apex Court in those judgments, we have evaluated the evidence on record. It is to be noted that the incidents have taken place at three places, first at the time of dashing of scooter, second in the lobby of Nilkanth Cinema and third in front of Nilkanth Cinema on the public road and these three incidents happened within three hours. If we take into consideration the second incident

then also, as per the evidence on record, the second incident has taken place at about 10:30 p.m. and last which is the fatal incident has taken place after about one and half hours. Evidence on record also shows that while leaving Nilkanth Cinema's lobby, the accused no.1 has threatened the deceased that he would be back and he came back after one and half hours with a definite knowledge that the exhibition of the picture would be over and when he came, the deceased and others were coming out from the theater and walking on footpath. As it was a pre-plan, he went to some other place and came with gupti sitting as pillion rider on scooter and on seeing the deceased, he got down from the scooter and tried to give blow to the deceased. Since he could not succeed, he chased him and ultimately succeeded to give blows with deadly weapon on the vital part of the body of the deceased. This has been proved by way of P.M. Note (Exh.66) and, therefore, we are unable to accept the arguments advanced by the learned counsel for the appellant-accused that it is a case of sudden provocation. Once it has been established that it is not a sudden provocation but a well designed plan, for which, he calmly waited and ultimately, he killed the deceased. The weapon used and the injuries received by the deceased are as such that he fell down and

succumbed to the injuries there itself. Thus, a young person aged about 30 years has lost his life leaving behind his wife, children and parents. Hence, we are of the opinion that the case does not fall under Section 304 Part II of the Indian Penal Code and, therefore, question of showing any sympathy to the appellant-accused no.1 does not arise.

28. As far as accused no.2 viz., Mukesh is concerned, he is the younger brother of accused no.1, who have been convicted by the Court below for the offence under Section 324 of the Indian Penal Code for six months and fine of Rs.500/-, in default, to undergo 15 days R.I. We have evaluated and considered his case on the basis of above referred evidence on record. The prosecution is not able to establish his presence except that three persons were running from the scene of offence towards Sorathiya Chawk. There are no other evidence to connect the accused no.2 with the crime in question. It appears that on 31.12.1996, he was arrested and, thereafter, was released on bail on 06.03.1997. It appears from running Pg.No.491 and pg.no.6 of the paper book and paragraphs no.2 of the judgment shows that the accused no.2 was arrested on 30.12.1996. Evidence of Investigating Officer, Shri Pavar, Pg.No.280, Exh.92, more particularly, paragraph no.2 of his deposition shows that the accused no.2 has

been arrested on 30.12.1996. As per the judgment delivered by the Court below, more particularly paragraph no.2 on page no.6 of the judgment, it has been categorically stated that he was released on 06.03.1997 vide order passed in Criminal Misc. Application No.295/1997. So practically, he remained in jail for 2 months and 7 days and his conviction is of 6 months and as we have stated above, the prosecution has failed to prove the guilt against the accused no.2 beyond reasonable doubt and, therefore, we grant him benefit of doubt.

29. The appeal is partly allowed. Judgment and Order of conviction and sentence dated 31.12.1998 delivered by the Learned Additional Sessions Judge, Rajkot in Sessions Case No.84 of 1997 are confirmed qua appellant-accused no.1 viz., Ashokbhai Talshibhai Ramani. However, the said Judgment and Order of conviction and sentence are modified qua appellant-accused no.2 viz., Maheshbhai Talshibhai Ramani and the sentence already undergone by him is ordered to be treated as the sufficient sentence imposed on him. The appellant-accused no.2 viz., Maheshbhai Talshibhai Ramani is therefore ordered to be set at liberty forthwith, if not required in any other offence. He is on bail and, hence, his bail bond stands cancelled.

Sd/- *Sd/-*

(R.P.DHOLAKIA, J.) (K.S.JHAVERI, J.)

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